Supreme Court, U.S.
FILED
04 MAR 28 2005
OFFICE OF THE CLERK

No. 04-13

In The Supreme Court of the United States

ALLEN OIL & GAS, L.L.C.,

Petitioner,

v.

MICHAEL KLISH, BRUCE JOHNSON, DANIEL SKRABACZ AND ADRAN PHILLIPS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

Claude T. Allen
Counsel of Record
ALLEN & ALLEN
301 Knipp
Houston, Texas 77024
(713) 464-2460

Counsel for Petitioner

THE LEX GROUP^{DC} ♦ 1750 K Street, NW ♦ Suite 475 ♦ Washington, DC 20006
(202) 955-0001 ♦ (800) 815-3791 ♦ Fax: (202) 955-0022 ♦ www.thelexgroupdc.com

QUESTIONS PRESENTED FOR REVIEW

1. Did the Tenth Circuit hold Allen Oil & Gas, L.L.C. (herein after "Allen Oil & Gas") to an excessively high standard of pleading when it dismissed its Complaint for failing to sufficiently allege that the Respondents personally participated in the deprivation of rights being complained of?

2. Should Allen Oil & Gas have been afforded an opportunity to amend its complaint before it was dismissed?

LIST OF ALL PARTIES TO THE PROCEEDING

The names of all the parties to the proceeding in the court whose judgment is sought to be reviewed are contained in the caption of this case.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, none of the parties have a parent company or non-wholly owned subsidiary.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

LIST OF ALL PARTIES TO THE PROCEEDING ii

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINIONS AND ORDERS BELOW 1

STATEMENT OF JURISDICTION 1

STATUTORY PROVISIONS AND REGULATIONS INVOLVED 2

STATEMENT OF THE CASE 4

Statement of the Facts 4

Proceedings Below 6

Basis for Federal Jurisdiction in the Court of First Instance 8

ARGUMENT 8

I. IN CONCLUDING THAT ALLEN OIL & GAS FAILED TO PROPERLY PLEAD THAT THE RESPONDENTS PERSONALLY PARTICIPATED IN THE ACTS CAUSING THE DEPRIVATION OF RIGHTS COMPLAINED OF, THE TENTH CIRCUIT BOTH IGNORED THE COMPLAINT AND IMPROPERLY IMPOSED AN ELEVATED PLEADING REQUIREMENT NOT SANCTIONED BY LAW 8

Dismissal for Failure to State Claim Should be Granted Infrequently 9

Personal Participation Requirement 9

Complaint Pleads Personal Participation 12

Decision Imposes a Heightened Pleading Burden 12

II. ALLEN OIL & GAS SHOULD HAVE BEEN AFFORDED AN OPPORTUNITY TO AMEND ITS COMPLAINT BEFORE IT WAS DISMISSED 14

Amendment Should be
Freely Allowed 14

Amendment Should have
been Allowed 14

CONCLUSION 15

APPENDIX

TABLE OF AUTHORITIES

Page(s)

Cases:

Allen Oil & Gas, L.L.C. v. Klish,
113 Fed. Appx. 869 (10th Cir. 2004),
cert. filed 1

Czosek v. O'Mara,
397 U.S. 25 (1970) 9, 14

Davis v. Hill,
173 F. Supp. 2d 1136 (D. Kan. 2001) 11

Director Gen. of Railroads v. Kastenbaum,
263 U.S. 25 (1923) 9

Dwire v. Toth,
215 F. Supp. 2d 1128 (D. Colo. 2002), *aff'd*,
2003 WL 1822692 (10th Cir. 2003) 10

Foote v. Spiegel,
118 F.3d 1416 (10th Cir. 1997) 9, 10

Hartford Fire Ins. Co. v. California,
509 U.S. 764 (1993) 9

Jenkins v. McKeithen,
395 U.S. 411 (1969) 9

Leatherman v. Tarrant County
Narcotics Intelligence & Coordination Unit,
507 U.S. 163 (1993) 13

Lewis v. Hyland,
434 U.S. 931 (1977) 10

Scull v. New Mexico,
236 F.3d 588 (10th Cir. 2000) 10

Stidham v. Peace Officer Standards & Training,
265 F.3d 1144 (10th Cir. 2001) 11

Swierkiewicz v. Sorema N.A.,
534 U.S. 506 (2002) 9, 13

Statutes:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 8

42 U.S.C. § 1983 ..... *passim*

Rules:

Fed. R. Civ. P. 8 13

Fed. R. Civ. P. 8(a)(2) 12

Fed. R. Civ. P. 9 13

Fed. R. Civ. P. 12(b)(6) 2, 8, 9

Fed. R. Civ. P. 15(a) 3, 14

Sup. Ct. R. 29.4(b) 1

Sup. Ct. R. 29.4(c) 1

Sup. Ct. R. 29.6 ii

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit in *Allen Oil & Gas, L.L.C. v. Klish*, 113 Fed. Appx. 869 (10th Cir. 2004), *cert. filed*, decided on October 26, 2004. Appendix at 1a. The district court's unreported order in 01-CV-1811, dismissing Allen Oil & Gas' claims for failure to state a claim for which relief may be granted and denying its request for leave to file an amended complaint was filed on January 30, 2003. Appendix at 8a. An order transferring venue for the case from the Southern District of Texas to the District of Colorado was signed on September 4, 2001. Appendix at 11a.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Tenth Circuit sought to be reviewed was decided on October 26, 2004, and Allen Oil & Gas' request for a rehearing was denied on December 29, 2004. Appendix at 20a. There has been no order granting an extension of time to file a petition for writ of certiorari. There has been no cross-petition for writ of certiorari filed. Jurisdiction to review the decision in question by writ of certiorari is conferred on this Court by 28 U.S.C. § 1254(1). This case does not require notification under Sup. Ct. R. 29.4(b) or (c).

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitutional and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Fed. R. Civ. P. 12(b)(6) provides:

> Every defenses, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading therein if one is required, except that the following defenses may at the option of the

pleader be made by motion: failure to state a claim on which relief can be granted. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets for a claim for which relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief may be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided for in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such motion by Rule 56.

Fed. R. Civ. P. 15(a) provides:

A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleadings only by leave of court or by written

> consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

STATEMENT OF THE CASE

Statement of the Facts

In 1997, Allen Oil & Gas, purchased the working interest in two oil fields located in Colorado, known as the "Tow Creek Field" and the "Buck Peak Field." When Allen Oil & Gas purchased these oil fields, several of the wells therein had been cited for violating various Colorado state regulations governing the operation of oil wells. These citations each: (1) identified a particular well; (2) described how the well allegedly did not comply with state regulation; (3) identified the regulation allegedly violated; (4) identified the corrective action required; and (5) established a deadline for bringing the well into compliance with regulations.

In 1999, Allen Oil & Gas was summoned to attend a meeting of the Colorado Oil and Gas Conservation Commission. The announced purpose of the hearing was to consider the alleged failure to remedy certain violations of state regulations governing the operation of some (but not all) of Allen Oil & Gas' wells.

An agent of Allen Oil & Gas appeared on its behalf before the Commission, and he requested and received a continuance to allow it to hire a lawyer. However, as a condition of receiving a continuance, Allen Oil & Gas was made to shut in all of the wells in the Tow Creek Field, regardless of whether the well was a subject of the hearing.

When the hearing reconvened, Allen Oil & Gas brought an attorney who was not licensed to practice in Colorado. Citing an administrative rule that does not permit an attorney who is not licensed in Colorado to represent a party before the Commission, the Commission would not recognize him as Allen Oil & Gas' representative. At the conclusion of the hearing, certain findings about regulatory violations were made, and all of the wells in the Tow Creek Field were ordered to be plugged and abandoned. This order made no distinction between wells for which findings of regulatory violations had been made and those with respect to which no regulatory violations were alleged or found.

Allen Oil & Gas retained a Colorado attorney who sought to have this order amended. At this third hearing, Allen Oil & Gas presented the reports and other evidence, and this evidence was well-received. Several Commissioners made statements indicating they were favorably disposed towards rescinding or amended the prior order.

After Allen Oil & Gas had finished presenting its evidence and arguments, the Commissioners entered executive session. While in executive session

some of the Commissioners, including some if not all of the Respondents, spoke with a civil servant employed by the Commission. After these off-the-record discussions ended, the hearing was reconvened, and the prior order was affirmed in all respects.

All of the wells in the Tow Creek Field were plugged, and the property and equipment associated with the production of oil and gas at Tow Creek (i.e., tanks, meters, pipes, etc.) were bulldozed and destroyed. The bond Allen Oil & Gas was required to post to operate in Colorado was forfeited. Finally, because Allen Oil & Gas' bond had been forfeited and because it lacked the financial resources to obtain another one, another "plug and abandon" order was entered against the wells located in the Buck Peak Field.

Proceedings Below

Allen Oil & Gas sued the Respondents (the members of the Commission who either voted against its request for an amendment of the original "plug and abandon" order or voted in favor of the original order and abstained from voting on whether it should be amended) in the District Court for the Southern District of Texas, alleging that they violated its due process rights by destroying its property without notice of an alleged violation a violation of law, based on the fact that wells were ordered plugged despite not being mentioned in the order setting the hearings on the Tow Creek Field and despite there being no determination that these wells were operated in violation of any law. The suit also alleged that Allen Oil & Gas' due process

rights were violated because the decision to plug its wells was not made by an impartial tribunal, based on the fact that the Respondents turned against it after their off-the-record discussions, and therefore were disposed against Allen Oil & Gas for reasons unrelated to any evidence or argument presented.

Allen Oil & Gas sued, and the Respondents request that venue for the suit be transferred to the District Court for the District of Colorado was granted. Appendix 11a. The Respondents subsequently asked that the suit be dismissed on several grounds, one of which was the assertion that Allen Oil & Gas failed to state a claim for which relief may be granted. The District Court held that Allen Oil & Gas had failed to state any claims for which relief could be granted. Appendix at 8a.

Allen Oil & Gas appealed this dismissal to the United States Court of Appeals for the Tenth Circuit. The Court of Appeals affirmed the District Court's decision, holding that Allen Oil & Gas had failed to explain how the Respondents had personally participated in the action complained of and therefore had failed to state a claim for which relief could be granted, and that denial of its request for leave to amend its pleadings was proper. Appendix at 1a. A request that this decision be reconsidered was denied. Appendix at 20a. From this disposition, the instant Petition for Writ of Certiorari has been filed.

Basis for Federal Jurisdiction in the Court of First Instance

The District Court had jurisdiction over the suit filed by Allen Oil & Gas pursuant to 28 U.S.C. § 1331 because the suit presents a federal question arising under 42 U.S.C. § 1983.

ARGUMENT

I. IN CONCLUDING THAT ALLEN OIL & GAS FAILED TO PROPERLY PLEAD THAT THE RESPONDENTS PERSONALLY PARTICIPATED IN THE ACTS CAUSING THE DEPRIVATION OF RIGHTS COMPLAINED OF, THE TENTH CIRCUIT BOTH IGNORED THE COMPLAINT AND IMPROPERLY IMPOSED AN ELEVATED PLEADING REQUIREMENT NOT SANCTIONED BY LAW.

Allen Oil & Gas' suit was dismissed pursuant to Rule 12(b)(6), for failing to state a claim upon which relief can be granted. Allen Oil & Gas' claims in this suit were based on the well-recognized provision of 42 U.S.C. § 1983, and so the conclusion that it had failed to state a claim was based on the determination that it failed to plead that the Respondents had "personally participated" in the events giving rise to the claim.

Dismissal for Failure to State Claim Should be Granted Infrequently

Courts that are presented with a request to dismiss a case pursuant to Rule 12(b)(6) must remember that they are the "primary guardians of the duty of fair representation," and so must construe complaints to avoid dismissal. *Czosek v. O'Mara*, 397 U.S. 25, 27 (1970). They must accept all the plaintiff's factual allegations as true, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 n. 1 (2002), liberally construing the complaint in the plaintiff's favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421-22 (1969). A complaint should be dismissed if and only if it is impossible for the plaintiff to prove any set of facts entitling him to relief, *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 811 (1993), even if the court believes it unlikely that the plaintiff will prevail. *Swierkiewicz*, 534 U.S. at 515.

Personal Participation Requirement

It goes almost without saying that a defendant's liability on any claim, including a claim actionable under 42 U.S.C. § 1983 "must be based on personal involvement in the alleged constitutional violation." *Foote v. Spiegel*, 118 F.3d 1416, 1423 (10th Cir. 1997). In fact, the observation that a party must be shown to have been involved in some wrong in order to be liable for that wrong is so self-evident that the personal participation requirement has never been discussed at length by the Honorable Court; the only cases mentioning personal participation either do so in passing, *see, e.g., Director Gen. of Railroads v. Kastenbaum*, 263 U.S. 25, 27 (1923) (noting that defendant must have

personally participated in false imprisonment to be liable), or in dissent. *See, e.g., Lewis v. Hyland*, 434 U.S. 931, 932 (1977) (Marshall, J., dissenting from denial of certiorari) (noting that the Court was still defining the contours of § 1983 claims based on "varying degrees of personal participation [by public officials]").

However, courts in the Tenth Circuit have recently issued a number of decisions involving personal participation issues, cases that show the application of the personal participation rule varies considerably from case to case. For example, in a false imprisonment case, it was held that named defendants who had no involvement with the delay in releasing the plaintiff were not subject to suit. *Scull v. New Mexico*, 236 F.3d 588, 599 (10th Cir. 2000). A similar result was reached in a case where the court found the fact that one of the defendants did not arrive at the scene until after the events giving rise to the claim could not be liable because he had not personally participated in those events. *Foote*, 118 F.3d at 1423-24. Finally, where the plaintiff wholly failed to "identify or even mention" two of the defendants he sued, and where his complaint "sets forth no allegations of misconduct" regarding these defendants, dismissal was appropriate because of the lack of connection between these defendants and the constitutional violation complained of. *Dwire v. Toth*, 215 F. Supp. 2d 1128, 1130 (D. Colo. 2002), *aff'd*, 2003 WL 1822692 (10th Cir. 2003).

In contrast, in a case factually similar to this one, the court found that where the plaintiff alleged that the "defendants" did certain acts that deprived him of his

constitutional rights, this statement was sufficient to plead affirmative link between one of the individuals named as a defendant and the deprivation of rights complained of. *Stidham v. Peace Officer Standards & Training*, 265 F.3d 1144, 1157 (10th Cir. 2001). In another suit where a prisoner alleged that a beating he received in the hands of sheriff's deputies violated his constitutional rights, the court did dismiss claims brought against the defendants who were nowhere near the plaintiff's cell at the time of the beating, but did not dismiss claims brought against defendants who were near the cell at the time of the assault, on the grounds that it could not determine that these defendants had not personally participated in the assault. *Davis v. Hill*, 173 F. Supp. 2d 1136, 1143-44 (D. Kan. 2001). Finally, the courts purport to announce a rule that it is relatively easy to show personal participation as a pleading matter: "[w]hile the link is rather loosely demonstrated, our system of liberal pleadings persuades us to accept Appellant's allegations without parsing responsibility to the various Defendants specifically." *Stidham*, 265 F.3d at 1157.

As the foregoing suggests, the common-sense "personal participation" requirement is not a high hurdle, and merely requires some pleading connecting the defendant to the acts or omissions complained of. However, in holding that Allen Oil & Gas had not met this requirement, the Tenth Circuit not only ignored the Complaint, it also effectively imposed a heightened pleading standard not sanctioned by the rules.

Complaint Pleads Personal Participation

Beginning with the Complaint, Allen Oil & Gas plead sufficient personal participation by the Respondents to avoid having its claim dismissed. The very first allegation in the Complaint is the blunt statement that the "[Respondents] stole [Allen Oil & Gas'] oil wells." It goes on to assert more generally that the "plug and abandon" order was an unconstitutional violation of due process, and that the wells were plugged "at the direction of the [Respondents]." As set forth above, the Respondents were members of the Commission at the time the order in question was entered, and the Complaint alleged not only this fact by that it was the Respondent's order resulted in the denial of due process on which the complaint was based, and that its losses are "a result of proximate and direct actions of the [Respondents]." Finally, none of the Respondents ever professed having any difficulty understanding what Allen Oil & Gas was claiming, and none of them objected that they had not personally participated in the acts being complained of. Despite this, the Tenth Circuit found that their personal participation had not been properly plead, and dismissed the suit. This conclusion is wrong.

Decision Imposes a Heightened Pleading Burden

In effect, the decision below imposes a heightened pleading burden on litigants. No longer is it sufficient for a plaintiff to provide the "short and plain statement of the claim" required by the rules. Fed. R. Civ. P. 8(a)(2). Instead, plaintiffs who wish to avoid this personal participation hurdle will be

compelled to provide prolix and detailed pleadings of all facts that connect the defendants to the claim, lest their claim be dismissed.

Such a burden is excessive, and is unsupported by the rules and by the authority cited above. A pleading is sufficient if it provides the defendant with "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Swierkiewicz*, 534 U.S. at 508. Imposing a heightened standard of pleading under the guise of requiring a showing of the requisite personal participation would effectively override the provisions of Rule 8, and ends up requiring something like the heightened pleading specificity required of certain issues by Rule 9.

This Court has rejected the assertion that lower courts may impose a heightened pleading requirement for civil rights suits brought pursuant to 42 U.S.C. § 1983. *Leatherman v. Tarrant County Narcotics & Intelligence Coordination Unit*, 507 U.S. 163, 165-68 (1993). The decision of the court below effectively imposes just such a heightened pleading requirement on civil rights cases, under the guise of alleging personal participation. Permitting this decision to stand uncorrected results in not just the dismissal of a single suit, but would affirm the imposition of an improper heightened pleading standard on other civil rights suits, under the guise of requiring litigants to plead that the defendant personally participated in the acts giving rise to the suit. Because personal participation is not one of the matters for which the rules impose a heightened pleading requirement, the

Tenth Circuit's decision that leads to the same result should be rejected.

II. ALLEN OIL & GAS SHOULD HAVE BEEN AFFORDED AN OPPORTUNITY TO AMEND ITS COMPLAINT BEFORE IT WAS DISMISSED.

Alternatively, even if it were to be assumed that Allen Oil & Gas' pleadings did not alleged sufficient personal participation to state a claim against the Respondents, it should have been given the opportunity to amend its Complaint to correct this deficiency.

Amendment Should be Freely Allowed

Leave to amend a pleading should "be freely given when justice so requires." Fed. R. Civ. P. 15(a). This is especially true if dismissal is being sought. In such a case, dismissal without opportunity to amend should only happen if it may be stated "beyond doubt" that the pleadings cannot be amended to state a claim. *Czosek*, 395 U.S. at 27.

Amendment Should have been Allowed

This high burden was not met here. Allen Oil & Gas asked that in the event dismissal was found to be proper, that it be given the chance to amend its Complaint. However, the district court *sua sponte* determined that it would be futile to allow it an opportunity to amend, saying that the fact it had not already done so meant it was "reasonable to conclude

that it cannot do so." The Tenth Circuit affirmed this disposition.

If the problem with Complaint in this case is that it does not set forth how the Respondents personally participated in the events giving rise to Allen Oil & Gas' claims, then it would stand to reason that an amendment to the Complaint could clarify this deficiency. Allen Oil & Gas believes its pleadings are sufficient (as discussed above), and so its failure to amend previously does not indicate that it cannot do so, but rather that there was no need to do so until dismissal was found to be appropriate. It is not possible at this juncture to say "beyond doubt" that Allen Oil & Gas cannot amend its pleadings to clarify the Respondents' personal participation in the events described above, and so Allen Oil & Gas should have been afforded that opportunity.

CONCLUSION

For all of the foregoing reasons, the Petitioner requests this Court to grant its Petition for Writ of Certiorari.

Respectfully submitted,

Claude T. Allen
Counsel of Record
ALLEN & ALLEN
301 Knipp
Houston, Texas 77024
Telephone: (713) 464-2460
Telecopier: (713) 464-2460